

October 11, 2005

***VIA FACSIMILE 703-602-0350***

Defense Acquisition Regulations Counsel  
Attn: Ms. Amy Williams  
OUSD (AT&L)  
IMD 3C132  
3062 Pentagon  
Washington, D.C. 20301-3062

**Re: Notice of Proposed Rule-Making, Export Controlled Information Technology  
DFARS Case 2004-D010**

Dear Ms. Williams:

I am writing on behalf of the University of Minnesota in response to the above referenced notice of proposed rule-making, published in the Federal Register on July 12, 2005. The University of Minnesota appreciates the opportunity to provide these comments.

The University of Minnesota is committed to the proper handling of any export controlled information and technology on our campuses. We have devoted resources to compliance with these requirements, and we will continue to do so. Like most major research universities, the University has recognized that the "fundamental research" exclusion under the export control laws and regulations is vital to the open research environment on our campus. To preserve this exclusion, the University almost never accepts restrictions on publication of research results.

We recognize, of course, that information that is not in the public domain may be subject to controls over disclosure of technological information to foreign persons within the United States. For this reason, the University of Minnesota has been particularly concerned about any technical information it receives under confidentiality agreements, and we scrutinize projects that call for confidentiality treatment of company or sponsor-provided information for potential export control issues.

Because of the University of Minnesota's concerns relating to confidential information, we viewed certain comments in the Department of Defense (DOD) March 25, 2004, Inspector General (IG) Report as appropriate and helpful. The IG Report noted that universities often rely on contract documents to identify export control issues. Indeed, in an open university environment operating under the fundamental research principle, export controls generally will not apply in the absence of contractual restrictions relating either to dissemination of results or to receipt of confidential information, and the IG's observation seemed appropriate. Further, we are concerned that companies might provide the University of Minnesota with controlled information without informing us of this fact, and the IG's recommendation that export

controlled information be clearly identified in the contract documents seemed a constructive proposal that would assist the University in its compliance with export control laws and regulations.

The primary concern over the DOD IG Report, and the central problem with the proposed DFAR, is the failure to acknowledge the central role that the fundamental research principle plays in universities' research on behalf of the DOD, leading to a proposed DFAR that could seriously damage that principle. DOD's own rules clearly designate category 6.1 and 6.2 research as fundamental research that, consistent with National Security Decision Directive 189, is subject to Distribution Statement A—no restrictions on public dissemination. Unless a university is receiving controlled information to conduct 6.1 or 6.2 funded research, there should be no issue regarding compliance with export control laws and regulations concerning technical data and information.

However, the proposed DFAR offers no concrete guidance on how contracting officers are to determine whether a project “may” involve export controlled information or technology. Viewed expansively, almost any project funded by DOD might involve some aspect of export controls, and contracting officers following the “safe” and cautious approach would be likely to apply the proposed DFAR broadly. To impose a panoply of export controls on 6.1 and 6.2 funded research would stifle the ability of universities to perform it and would thereby damage the national security.

Furthermore, in the current climate of uncertainty over the Department of Commerce's treatment of “use” technology, contracting officers will have additional reason to conclude that research utilizing any advanced equipment “may” be export controlled and to impose inappropriate restrictions on university fundamental research. We join others in urging DOD either to withhold consideration of this revision until the Department of Commerce's view on “use” technology is clarified, or to coordinate its actions here with the Department of Commerce's actions.

Although the DOD contracting officer may be in a position to know whether the DOD itself will be providing restricted data in connection with a project (since all such government data are marked with an appropriate designation), how is the officer to know whether a prime contractor will be providing its controlled information to a university subcontractor? This “flow-down” situation is likely to present the greatest difficulty, with the contracting officer erring on the side of caution, and with the prime contractor's personnel then insisting their hands are tied by the prime award. We believe prime contractors should be instructed to clearly identify any export controlled technologies prior to disclosing them to University subcontractors, but that they should also be specifically directed not to flow down the proposed DFAR to a university performing 6.1 or 6.2 category work unless the university will actually be receiving restricted information. We recommend that the DOD contracting officer should be directed not to require the prime contractor to flow down of this clause to university subcontractors absent specific information that the University will be receiving export controlled company information (or DOD restricted information). If the contracting officer is uncertain whether a company will supply restricted information to a university subcontractor, the obligation to determine whether a flow-down is needed should rest with the company, not with the contracting officer.

The specification of elements of control plans in the proposed DFAR is inappropriate. Often the best “control plan” is that only the university principal investigator is provided access to controlled information, and that access is provided off-campus at the company. No restricted information enters the university environment. Another “control plan” the University of Minnesota has implemented is this: the professor bought a safe, and only he has the combination. Open universities do everything reasonably possible to avoid receiving information that would require the badging, work space access controls and similar restrictions found in most industrial control plans. Where universities do receive controlled information, they should be accorded maximum discretion to develop appropriate control plans, which in many cases can be quite minimal.

The University appreciated the comments of DOD personnel at the September 16, 2005, National Academies forum on the proposed DFARS. Based on those comments, we hope and trust that the DFAR will be substantially revised to ensure that it does not impinge on the fundamental research principle.

Thank you for consideration of these comments. The University of Minnesota has reviewed and concurs with the comments of the Council on Governmental Relations and the National Association of State Universities and Land Grant College, and we urge DOD’s careful consideration of those comments.

Sincerely,

A handwritten signature in black ink, reading "R. Timothy Mulcahy". The signature is written in a cursive, flowing style with a large initial "R".

R. Timothy Mulcahy, Ph.D.  
Vice President for Research